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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

COMMONWEALTH OF VIRGINIA,

Appellant,

—v.—

AMERICAN BOOKSELLERS ASSOCIATION, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF JEAN M. AUEL, JUDY BLUME, JACKIE COLLINS, JOHN IRVING, ERICA JONG, NORMA KLEIN, JAMES A. MICHENER, SIDNEY SHELDON, JOHN UPDIKE, IRVING WALLACE, THE AUTHORS LEAGUE OF AMERICA, INC., AND THE AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, AS *AMICI CURIAE*, IN SUPPORT OF APPELLEES.

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Preliminary Statement

Ten individual authors and two professional organizations together representing thousands of additional authors submit this brief, *amici curiae*, pursuant to Rule 36 of the Rules of this Court, urging affirmance of the judgment of the United States Court of Appeals for the Fourth Circuit in this case. The court of appeals struck down as unconstitutional the Virginia statute here in issue on the grounds, *inter alia*, that the statute "discourages the exercise of first amendment rights in a real and substantial fashion. . . ." (J. S. App. A 11). The written consents of the parties to the filing of this brief have been obtained and are being filed with the clerk of this Court.

The Amici

Jean M. Auel is a novelist and poet whose highly acclaimed works include *The Clan of the Cave Bear* (1980), *The Valley of Horses: Earth's Children* (1982), and *The Mammoth Hunters* (1985).

Judy Blume is the author of *Wifey* (1978) and *Smart Women* (1984), as well as two novels aimed for young adults, *Forever* (1975) and *Tiger Eyes* (1981). Additionally, she has written fifteen books for children. Ms. Blume is a board member of the Society of Children's Book Writers and the 1984 recipient of the Carl Sandburg Freedom to Read Award from the Chicago Public Library.

Jackie Collins is the author of numerous popular novels including *Hollywood Wives* (1983) and *Hollywood Husbands* (1986), *Chances* (1982), and *Sinners* (1984). Two of her novels, *The World Is Full of Married Men* (1968) and *The Stud* (1969), have been released as feature films.

John Irving is the author of six novels, including the popular works *The World According to Garp* (1978) and *The Hotel New Hampshire* (1981). Mr. Irving was a Rockefeller Foundation grantee in 1971-72, and a National Endowment for the Arts fellow in 1974-75.

Erica Jong is a poet and fiction writer, whose novel *Fear of Flying* (1974) was a bestseller and Book-of-the-Month Club alternate. Her more recent publications include *Serenissima* (1987) and *Parachutes & Kisses* (1985). Ms. Jong has received the American Academy of Poets Award, the Borestone Mountain Award in poetry, the Bess Hokin prize from *Poetry Magazine* and the Alice Faye di Castagnolia Award of the Poetry Society of America.

Norma Klein is the author of novels, short stories, and fiction for children and teenagers. Her works include *Girls Turn Wives* (1976) (Literary Guild Book Club alternate selection), *Give Me One Good Reason* (1973) (Book-of-the-Month Club alternate), *Family Secrets* (1985) (teenage fiction) and *Mom, the Wolf Man and Me* (1972) (teenage fiction). In 1983, she was awarded the O. Henry Award for her short story "The Wrong Man."

James A. Michener is a renowned author whose novels include *Tales of the South Pacific* (1947), for which he won the Pulitzer Prize, *The Bridges at Toko Ri* (1953), *Caravans* (1963), *The Source* (1965), *The Drifters* (1971), *Centennial* (1974), *Chesapeake* (1978), *The Covenant* (1980), *Space* (1982), *Poland* (1983) and *Texas* (1985). In May, 1984, Mr. Michener was recognized by President Ronald Reagan for his long-standing and continuing support of the arts in America.

Sidney Sheldon has authored the following popular novels: *The Other Side of Midnight* (1974), *A Stranger in the Mirror* (1976), *Bloodline* (1977), *Rage of Angels* (1980), *Master of the Game* (1982) and *If Tomorrow Comes* (1985). He received the Academy Award in 1948 for his screenplay, "The Bachelor and the Bobby-Soxer," and the Tony Award in 1956 for his book for the Broadway play "Redhead."

John Updike is the distinguished author of many novels and short stories including *Rabbit Run* (1960), *Pigeon Feathers* (1962) (short story collection), *The Centaur* (1963), for which he received the National Book Award, *Rabbit Redux* (1971), *The Coup* (1978), *Rabbit is Rich* (1981), for which he received the Pulitzer prize, and *The Witches of Eastwick* (1984). He is a

frequent contributor to *The New Yorker*, where he was a staff member from 1955 to 1957.

Irving Wallace is a widely read author of fiction and non-fiction, whose many books include *The Prize* (1962) (Book-of-the-Month Club special selection), *The Word* (1972) (Book-of-the-Month Club selection), *The R Document* (1976) (*Reader's Digest* Book Club selection), *The Pigeon Project* (1979) (Literary Guild selection), *The Book of Lists* (1977), *The Miracle* (1984), and *The Seventh Secret* (1986). For his novel *The Man* (1964), Wallace received the George Washington Carver Memorial Institute Award and the Commonwealth Club of California silver medal. Mr. Wallace's novel *The Seven Minutes* (1969), whose thematic focus was censorship, won the Paperback of the Year Award from the National Bestsellers Institute. Over 194 million copies of Mr. Wallace's books have been sold to date.

The Authors League of America, Inc. is the major national society of professional authors, representing more than 14,500 authors, dramatists, and journalists. One of the League's principal purposes is to express its members' views in cases involving fundamental questions of freedom of expression and to support that fundamental constitutional right.

The American Society of Journalists and Authors, formed in 1948, is a nationwide organization of over 700 members who qualify as professional independent non-fiction writers. Its members write magazine articles, trade books, and other works of non-fiction, including works in the field of health and human sexuality.

Interest of The Amici

Freedom to speak and write is an abstraction to most, but for the writer it is a necessity of his daily craft. It is an open space to traverse in setting down one's thoughts, the freedom to roam where imagination, learning, and conviction carry. Censorship, however motivated, is an intruder which hems in the writer, setting up barriers which both confine and distort the expression of the writer's vision.

As authors and representatives of authors of a wide range of fiction and non-fiction, *amici* submit this brief to warn that the Virginia statute at issue in this case threatens to have such a confining effect. Although directed at protecting persons under 18 years of age from undue exposure to sexually-explicit materials, the statute, in practical application, would have far broader consequence. As the trial record in this case makes clear, for a retailer to effectuate the law's requirements would entail removing from public display—and hence from perusal by persons over 18 years of age—any works the sexual content of which might be objectionable to the youngest child. Virginia's effort at remedy is surely overbroad, especially in the face of existing state law—not here challenged—prohibiting the sale to minors of materials obscene as to them. Va. Code § 18.2-390 and 391 (1970). Further to regulate displays of a wide range of materials of value to adults and even to older teenagers so as to protect the sensibilities of the youngest minors is, as this Court has observed, "to burn the house to roast the pig." *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957).

The Virginia statute is of more than theoretical concern to *amici*. The individual *amici*, representative of many of their fellow authors, write for audiences ranging from adult readers to children growing into adulthood. Many of *amici's* works deal candidly with sexual themes, reflecting the reality that sexuality is a central aspect of human existence. To be sure, those of *amici's* works which deal with such themes and which are directed to younger-than-adult audiences reflect an appropriate sensitivity to the needs and level of emotional preparedness of the targeted reader. But the Virginia statute fails to accommodate these literary objectives. To the contrary, the statute threatens the vitality of the range of these works by its indiscriminate ban on displays of any work which is "harmful to minors" of any age—no mind the importance of the work for adults or older juveniles.

Amici appreciate fully that a community may find that the treatment of sex in particular works makes those works unsuitable for young children. But if communities are able to cut authors off from the more mature audiences to which their

works are directed by conditioning the public availability of their works upon their suitability for the youngest reader, *amici* will be pressured to limit or eliminate altogether the treatment of sex in order to allow their books to be freely disseminated.

History does not allow *amici* to be complacent about the likelihood of application of statutes like Virginia's to mainstream works of literature. Experience teaches of the willingness of local majorities—in the name of protecting children—to condemn works widely regarded as fine literature. Virginia's juvenile display law, directed at commercial displays of works unsuitable for the youngest child, is on its face indifferent to the overall literary value of a particular work. Booksellers and other retailers are left, under the statutory scheme, to the whim of the local prosecutor, and the community sentiment which his enforcement initiatives invariably will reflect. Such an environment is deeply inhibiting to literary creativity and is contrary to firmly-rooted First Amendment principles.

This Court long ago ruled that a state's interest in protecting children from sexually explicit materials does not warrant "reduc[ing] the adult reading population . . . to reading only what is fit for children." *Butler* v. *Michigan*, 352 U.S. 380, 383-84 (1957). If the authors here represented are to practice their craft, to write openly, provocatively and educationally about the topic of sex, a matter of "absorbing interest to mankind" (*Roth* v. *United States*, 354 U.S. 476, 487 (1957)), and to reach their intended adult and older teenage audiences, then Virginia's statutory deterrent to such expression and dissemination must be stricken down under the First Amendment.

Argument

THE VIRGINIA STATUTE VIOLATES THE FIRST AMENDMENT BY IMPERMISSIBLY RESTRICTING ADULTS' ACCESS TO CONSTITUTIONALLY-PROTECTED MATERIALS

Virginia's juvenile display statute makes unlawful the display for commercial purposes of books, magazines and other printed matter deemed "harmful to minors," in a manner "whereby juveniles may examine and peruse" them. Va. Code § 18.2-391(a). A "juvenile" is defined under the statute as anyone under 18 years of age. Va. Code § 18.2-390(1).

The trial record makes clear that the potential sweep of the law is immense. Works of many, if not all, of the individual *amici* and of scores of the organizational *amici's* members arguably would fall prey to the statute. (See J.S. App. A 20).[1] Not that such works are "pornographic" or otherwise of marginal literary, artistic or educational value. Rather, frank portrayals of sexual themes, while integral to much of fiction and non-fiction for adults, may well be unsuitable for very young children not yet emotionally equipped to deal with such matters. The statute indiscriminately bars display of works which may be "harmful" to such young children—without regard to the value these works unquestionably have for older readers.

The record further reveals that the options presented to the bookstore or other retail establishment so as not to risk criminal prosecution under the law for displaying works potentially "harmful" to 5, 10 or 12 year olds are all severely damaging to the First Amendment interests at stake. One option is to stop displaying and selling altogether the potentially offending works. It is readily apparent that the exercise of this option would severely constrain the creation of works

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1 Illustratively, the Attorney General of Virginia argued before the Fourth Circuit that one of the best-selling works of *amicus* Jackie Collins, *Hollywood Wives*, would be covered under the statute. (C.A. Va. Br. 27-28).

dealing with sexuality as a central aspect of human existence. The discouragement of writings about sex would be tragic indeed.

Depictions of sex in the individual *amici's* works are not gratuitous. As the sexual feelings and attitudes of an individual are an integral aspect of his identity, so the depiction of those feelings breathe life and definition into the characters *amici* and other authors create. As Henry Miller wrote, sexual passages in literature "represent my endeavor . . . to portray the *whole* man. . . . man in all the heights and depths of his being."[2] To force authors to deemphasize, or eliminate altogether, portrayals of sexual feelings and relations would distort the expression of the author's vision and deprive literature of its needed free rein to communicate about the human experience at every level.

As to non-fiction writing, the statute would threaten the flow of accurate, well-researched information regarding health and human sexuality to the public. Books and magazines play a critical role in educating individuals on these private matters.

The alternative presented to the retailer of limiting open display of potentially "harmful" works—through "adults-only" sections, under-the-counter storage, and the like—was demonstrated by the trial record to be no less dangerous to preserving First Amendment principles. For, as the court of appeals noted, such measures—even to the extent economically practicable—"unreasonably interfere[ ] with the booksellers' right to sell the restricted materials and the adults' ability to buy them." (J.S. App. A 10).

The open display of books and other reading materials is essential to their widespread public distribution. The buying public is a browsing and perusing public. If sales of reading materials were dependent upon readers requesting specific titles from the "back room," fewer works would be read, to the detriment of authors, publishers, and the reading public.

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2 Henry Miller, "First Letter to Trygve Hirsch (1957)," in *Henry Miller on Writing* 207 (Thomas H. Moore ed. 1964).

In so fundamentally inhibiting adult access to constitutionally-protected materials, the Virginia statute, whatever its intent, runs afoul of the First Amendment. For, as this Court has observed, even a legitimate state interest in protecting children from sexually explicit materials "does not justify a total suppression of such materials, the effect of which would be to 'reduce the adult population . . . to reading only what is fit for children.' " *Jacobellis* v. *Ohio*, 378 U.S. 184, 195 (1964), *quoting Butler* v. *Michigan*, *supra*. This basic principle has been affirmed in other decisions of this Court, most recently in *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 73-74 (1983). *See also Bantam Books Inc.* v. *Sullivan*, 372 U.S. 58, 71 (1963).

If literature is to fulfill its full role in society—to elucidate our shared sentiments, heighten our appreciation of reality, expand our sense of the possible—the adult reader must have ready access to all works of potential interest. The Virginia statute impedes that access, effectively supplanting what our Constitution entrusts to the author with a heavy-handed censorship regime.

Conclusion

Amici are proud of the literary tradition they help sustain and nurture. They can thrive only in a climate where their ideas are freely available to those who wish to entertain them. Virginia's juvenile display law, if upheld, will inhibit the free flow of ideas between such authors and the audiences entitled to receive them. This result would be a costly one to our First Amendment freedoms. Accordingly, the judgment of the court of appeals striking down the law as violative of the First Amendment should be affirmed.

Respectfully submitted,

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